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Scottish Independence Insta-Symposium: ‘Negotiated Independence’—Scottish Independence and a New Path to Statehood?

by Stephen Tierney

[[Stephen Tierney](#) is a Professor of Constitutional Theory, University of Edinburgh and Director of the Edinburgh Centre for Constitutional Law.]

In the [Edinburgh Agreement](#) of 2012 the United Kingdom Government committed itself to respect the outcome of the Scottish independence referendum. This suggests that, in the event of a Yes vote, the transition to independence will be relatively straightforward, as will the pathway to Scotland's international recognition and membership of the United Nations – see [here](#).

How then would Scotland's move to statehood be characterised under international law? It is extremely unlikely that the UK will be taken to have dissolved. The international community is generally ill-disposed towards state dissolution. Despite the loss by Pakistan of over half its population in the secession of Bangladesh it continued to be recognised. More recently the Republic of Sudan survived the loss of the significant territory and population of South Sudan. Certainly Scotland constitutes a significant area (almost one third) of the United Kingdom's land mass, but it contains less than 10 per cent of the population. The territories of England, Wales and Northern Ireland would all still be contained within the United Kingdom and the UK would retain its principal governmental institutions. These factors suggest a strong presumption in favour of the UK's continuation.

There are also political considerations. The significance of the UK as a member of the EU, NATO and the Security Council of the United Nations would all be important factors in encouraging others to view it as the continuing State. By analogy, the fact that Russia could continue as a permanent member of the Security Council, thereby avoiding the need to revisit how membership of that body is constituted, was without doubt a significant factor in the international community treating Russia as the USSR's continuation.

Therefore, Scotland would I think clearly be taken to have seceded from the UK (taking secession to be ‘the effort of a group or section of a State to withdraw itself from the political and constitutional authority of that State, with a view to achieving statehood for a new territorial unit on the international plane’. Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 83.). But all the same, the label secession doesn't seem to fit very well. We tend to think of secession as a unilateral act, denounced as illegal by the remainder state. It is notable that in light of the Edinburgh Agreement, [Crawford and Boyle](#) seem to characterize the process almost as a *sui generis* situation, what they term ‘negotiated independence’. Certainly the consensual negotiation process which would likely follow a Yes vote would surely have a significant bearing in how Scotland would be treated by the international community.

Let me turn then to issues of recognition and succession. Recognition is itself a complex and contested area of international law. There is no institution authorised to determine definitively the legitimacy of claims to recognition as a new State. Indeed, the generally held view is that recognition is a uniquely political act, operating largely if not entirely at the discretion of States. Certainly Scotland would seem to fit the minimalist Montevideo Convention criteria for statehood as well as the criteria for recognition advanced by the European Communities Guidelines on the Recognition of New States issued in 1991: for example, respect for the rule of law, democracy and minority rights. Notably the Supreme Court of Canada in the *Secession Reference* referred to the domestic legality of the secessionist act as another possible condition for recognition. If so, then again the UK's acceptance of Scotland's independence in the event of a Yes vote and the likelihood of negotiations between the two governments to this end would surely greatly assist an independent Scotland in the search for early international recognition.

How then would Scotland succeed to the rights and responsibilities that currently apply to the United Kingdom? Unlike the situation with state recognition, state succession has been the subject of considerable attention by the International Law Commission of the United Nations – see [here](#) and [here](#). Despite this work the area is still subject to considerable confusion and disagreement. It seems certain that an independent Scotland would assume responsibility for the international relations of the territory of Scotland under international law but that does not mean that it would succeed *automatically* to all of the UK's rights and responsibilities, to treaties, and in particular to membership of international organisations. For the avoidance of doubt it would probably make sense for an independent Scotland to accede to major multilateral treaties. At the same time, and assuming the continuation model, the UK State would continue to function as before, be recognised as identical to the State as it existed prior to the secession, would continue to enjoy the same rights and owe the same obligations, and retain UK membership of international organisations.

Scottish succession to membership of international organisations is an intense political issue. Regardless of the disagreement surrounding the meaning of Article 34 of the [1978 Convention](#), we need to treat this as a separate issue from succession to treaty obligations. The same Convention (Art. 4) is clear that succession to constituent instruments of an international organization is: ‘without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.’ In other words, international organisations control their own membership and any special rules they set for membership supersede principles of general international law.

I will discuss only the United Nations here. It seems highly likely that the UN will treat the UK as the continuing State and that an independent Scotland would, as a new State, be required to apply for membership. For precedents see India/Pakistan; Malaysia/Singapore; Pakistan/Bangladesh; Serbia/Montenegro; Sudan/South Sudan. Other new States such as the Czech Republic, Slovakia and Eritrea have also had to apply for membership as did the former republics of the SFRY, including the Federal Republic of Yugoslavia.

Although Scotland would be required to apply for membership under Article 4 of the Charter, there do not seem to be any significant obstacles. The conditions for admission are that the candidate territory be a State; be peace-loving; accept the obligations of the Charter; be able to carry out its Charter obligations and be willing to do so. Without going into details it seems clear Scotland would satisfy each of these criteria. Of course, if the United Kingdom were to object to Scottish independence, then Scotland could find it difficult to obtain the required level of support within the General Assembly for admission, and as a continuing permanent member of the UN Security Council the UK could also attempt to use its veto to prevent a recommendation that Scotland be admitted. Each of these scenarios seems highly unlikely. Since we might reasonably anticipate negotiations between the UK and Scottish Governments leading to agreed terms for Scottish independence, and since an independent Scotland would most probably be considered an important ally by the UK, it is realistic to assume UK support for Scotland's UN membership application.

Another big issue is Scotland's membership of the EU discussed [here](#) and [here](#).



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